IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

ARBITRATION PETITION NO.324 OF 2006

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Mr.Shyam Chimandas Khilnani
and ors. ...Petitioners

v/s.

M/s.Radha Enterprises & Anr. ...Respondents

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Mr.Bhavesh Parmar for the Petitioners.
Mr.Snehal Shah i/b Viraj Maniar & Associate for the Respondents.
Mr.Pratik Sakseria i/b Nivit Srivastava for Respondent No.2.

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**CORAM: D.K.DESHMUKH, J.**

**DATED:** 18TH OCTOBER,2006

**P.C.:**

1. All the parties before me are agreed that the order dated 20th September, 2006 passed by this court in this petition has been set aside by the Appellate Court and the petition has to be heard again.

2. This petition is filed under Section 9 of the Arbitration Act because according to the Petitioners there is an arbitration clause contained in the agreement dated 2nd December, 2002. Perusal of the agreement dated 2nd December, 2002 shows that to that agreement there are three parties, (i) Pushpira Co.operative Housing Society Ltd.; (ii) M/s. Radha Enterprises and (iii) 11 members of the society namely Pushpira Co.operative Housing Society Ltd. The agreement between the parties is for redevelopment of the building which is owned by the society and is occupied by the eleven members who have been joined as parties to the agreement independently of the society. The present petition has been filed by four out of the eleven members who are parties to the agreement. The interim order that

is sought in the petition is an injunction restraining the Respondent No.1- builder from continuing the redevelopment work of the building. The work, the Respondent No.1/builder, is carrying on pursuant to the tri-parted agreement dated 2-12-2002. Therefore, the first question that arises for consideration is before making an order restraining one of the parties to the agreement from carrying on the work, other persons who are admittedly parties to the agreement would be necessary parties to this petition or no?. When I pointed out to the Advocate for the Petitioner that it appears that all the necessary parties have not been joined, he did not dispute that all the persons who are parties to the agreement dt.2-12-2002 would be necessary parties to this petition. However, he submits that he can not be faulted for not joining five out of the seven members who have not been joined as parties to the petition. He submits that he is willing to join two remaining members as parties to this petition and prayed for grant of leave to amend the petition for that purpose. He submits that there are 11 members who are parties to the agreement. Out of these 11 members 4 members are petitioners. Out of the remaining 7 members, 2 members have died. Their

legal representatives have not been brought on the record of the society. Therefore, the legal representatives of the deceased members cannot be joined as parties to this petition as they are not necessary parties. He further submits that 3 out of the 7 members who have not been joined, have entered into separate agreements with the builder and the society, therefore these 3 members have ceased to be parties to the agreement dt.2-12-2002. Hence, these 3 members are not necessary parties to this petition. In so far as the remaining 2 out of the 7 members are concerned, he is willing to join them as parties to the petition and sought leave to amend the petition for that purpose.

3. In my opinion there can be no dispute that before making interim order restraining the Respondent No.1 from carrying out redevelopment work pursuant to the agreement dated 2-12-2002 all persons who are parties to that agreement will have to be heard by the Court. Because it is possible that the interim order may cause prejudice to the interest of those persons who are parties to the agreement, but are not before the court. In my opinion, the society also can not claim to represent those seven members in so far as

agreement dated 2-12-2002 is concerned. Apart from the society being party to the agreement, those eleven persons have been joined as parties to the agreement in their individual capacity. The learned Counsel appearing for the Petitioners himself conceded that though by the arbitration clause right to appoint the arbitrators is given to the Developer and the society, in the arbitration proceedings all the eleven members will have to be heard by the arbitral tribunal. In my opinion, as even according to the petitioners the arbitral tribunal would be obliged to hear all the eleven persons in the arbitral proceedings, this court is also obliged to hear all eleven persons before making any interim order u/s. 9 in relation to any rights that may arise under the agreement dated 2-12-2002. So far as the submission that because two members are dead and the names of their legal representatives are not brought on record of the society and therefore the Petitioner can not join them as parties is concerned, in my opinion the submission has no substance. The two dead members had joined as parties to the redevelopment agreement because they were holding flats in the building of the society. On their death, their rights as holders of the flats would be

inherited by their heirs according to law of succession applicable to them. Only because on the record of the society the names of the heirs are not mentioned, the heirs would not lose their rights inherited by them. Even according to the petitioners, had those two members been alive, they would be necessary parties to this petition. Therefore, on their death their legal representatives would be necessary parties. If the legal representatives of those dead persons are necessary parties, duty is cast by law on the Petitioners to search out the legal representatives and then join them as the parties. The Petitioners can not avoid joining the legal representatives as parties to the petition because in the society's record their names are not shown as legal representatives of the deceased persons.

5. So far as the agreements, because of which according to the Petitioners three members have ceased to be parties to the agreement dated 2-12-2002 are concerned, in my opinion for examining the case put up by the Petitioners and for recording a finding in favour of the Petitioners that because of the subsequent agreements entered into by these three

persons they have ceased to be parties to the agreement dated 2-12-2002, the court will have to hear them. In other words, the court can not record a finding which the Petitioners have invited that those three persons have ceased to be the parties to the agreement dated 2-12-2002 without granting them an opportunity of being heard. Therefore, if the Petitioners want the court to record a finding that these three persons have ceased to be parties to the agreement dated 2-12-2002 it was for the Petitioners to join them as parties to the petition and serve them. As even according to the Petitioners these three members, but for the alleged subsequent agreement entered into by them, were necessary parties to this petition, it was necessary for the Petitioner to firstly join them as parties to the petition, secondly to plead that because of the subsequent agreement they have ceased to be parties to the agreement dt. 2-12-2002 , it was duty of the petitioners to produce the copies of the alleged subsequent agreements on record of the petition. The Petitioners have done none of these things.

6. So far as the request made by the Petitioners that, leave to amend the Petitioner for joining the

remaining two members as parties to the petition is concerned, in my opinion, the request cannot be granted for several reasons. As I have found that all the eleven members are necessary parties to the petition, joining of only two as parties will not serve any purpose. If even according to the Petitioners, these two persons were necessary parties to the petition, no reason is disclosed for not joining them as parties in the first instance. Grant of the leave would require keeping the petition pending. The Petitioners have secured ad-interim order which is presently operating. If the petition remains pending, the ad-interim order would also continue. Continuation of the ad-interim order would be unfair to everybody concerned.

7. In these circumstances therefore, as I find that the Petitioners have not joined the necessary parties to the petition, petition is disposed of.

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